the legal duty of the utility itself, or of the state commission, to raise or lower the rates so that they are again reasonable, and as such applicable to all members of the public receiving a like or substantially similar service.[26] Although the law of public utilities recognizes the right of the utility to establish reasonable rate differentials corresponding to a real difference in the service rendered,[27] that is of no avail here, for the service to the contract patron and non-contract patron is the same, and there can be no legal justification for a more favorable rate to the contract patron.

In substance, then, the long-term rate contract or franchise between the public utility proprietor and the patron, irrespective of whether that patron is a municipality or a person, is simply an attempt to subject to contractual control a subject which is peculiarly a matter of law as affected by overpowering external influences, which in the nature of things cannot be bound down to *a priori* agreements or enactments.[28] To enforce these long-term fixed rates under the changed conditions of the present day would result in the anomaly of the law defeating the law.

It is submitted that the solution of this problem, applicable to both cases discussed and supporting the legal right to increase the rates in each, is to be found in the well-recognized legal category of the law of public utilities; that the very nature of the subject matter of these long-term rate contracts and franchises, and the necessary operation of the common-law standards requiring reasonable service at reasonable rates, make such contracts unlawful as dealing with that which is primarily a matter of law, and not only beyond the scope of the doctrine of liberty of contract, and hence outside the class of legally enforceable obligations, but, *a fortiori*, without the protection of the contract clause or the due process clause of the federal or state constitutions.

FEDERAL REVIEW OF DECISIONS OF STATE COURTS INVOLVING FEDERAL QUESTIONS UNDER THE JUDICIAL CODE, § 237, AS AMENDED. — The extent to which the federal judiciary should control the state judiciary

Coast Electric Ry. Co. *v.* Board of Public Utility Commissioners, 104 Atl. (N. J. L.) 218, 220 (1918).

Of course, in order that the rates could be classed as unreasonable under the circumstances the prevailing conditions must be such as to substantially affect the ability of the utility to earn a fair return on its investment, and to maintain the necessary standard of service properly to fulfill its duty to the public, for the courts recognize the business fact that in such undertakings there is a certain extent of "missionary" effort required in order to build up the plant and introduce its product more widely; and again, the law does not undertake to guarantee even public service enterprises against any and all losses, since they should prepare to meet temporarily unfavorable conditions, and to render incidental services which may not in themselves be profitable. People of the State of New York *v.* McCall, 245 U. S. 345 (1917); Atlantic Coast Line R. R. Co. *v.* North Carolina Corporation Commission, 206 U. S. 1 (1907). *Cf.* Northern Pacific Ry. Co. *v.* State of North Dakota, 236 U. S. 585 (1915).

[26] See 32 HARV. L. REV. 74, 78.

[27] Interstate Commerce Commission *v.* Baltimore & Ohio R. Co., 145 U. S. 263 (1892).

[28] The power of the legislature to fix public utility rates is limited to reasonable rates. Chicago & Grand Trunk Ry. *v.* Wellman, 143 U. S. 339 (1892); Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362 (1894); Smyth *v.* Ames, 169 U. S. 466, 526 (1898); Covington & L. Turnpike Road Co. *v.* Sandford, 164 U. S. 578 (1896); San Diego Land and Town Co. *v.* National City, 174 U. S. 739 (1899).

has always been a delicate problem. That the federal judiciary should finally determine federal questions regardless of the court of origin is, however, undisputed. A proper balance between federal and state sovereignty in this matter was at first sought by subjecting final proceedings in a state court to review, on writ of error or appeal, by the federal Supreme Court, broadly, when a federal right was claimed and denied, or when a state right asserted to be inconsistent with a federal right was upheld.[1] Thus were the authority of the United States, and the rights claimed thereunder, protected, while the state was left supreme in its own field.[2] By such legislation the existence of the federal authority was preserved, but its scope could not be defined by the federal judiciary, for the federal issue was still determined in the state court whenever the questioned right, if federal, was sustained, or if state, was denied. Thus individual rights involving federal questions were unprotected from the point of view of the party who unsuccessfully asserted a state right; moreover, so long as the state court held state laws invalid under the Federal Constitution, the state was unable to get an authoritative determination of the issue of constitutionality. In addition, federal statutes were subjected to divers constructions so long as the different state courts sustained the federal right claimed thereunder.[3]

In response to a demand by the bench and bar for reform,[4] jurisdiction was conferred on the United States Supreme Court in 1914 to review by writ of *certiorari* federal questions finally determined in state courts regardless of the course of decision.[5] In 1916 a restrictive amendment established the present system.[6] Instead of both writ of error and *certiorari*, *certiorari* alone now lies where, in the highest state court, a federal right, title, or immunity was denied; with this exception, review by *certiorari* is restricted to cases in which the court below has sustained the federal claim. Accordingly, writs of error now issue to state courts where the decision below (1) denied the validity of a treaty, statute, or authority exercised under the United States, or (2) affirmed the validity of a state statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States; while writs of *certiorari* issue to state courts when the decision below (1) affirmed the validity of a treaty, statute, or authority exercised under the United States, or (2) denied the validity of a state statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States, or (3) affirmed or denied the validity of a title, right, privilege, or immunity claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States. Since the exercise of such jurisdiction is a discretionary matter,[7] the Supreme Court is thus

[1] U. S. REV. STAT. § 709; JUD. CODE, § 237; Commonwealth Bank of Ky. *v.* Griffith, 14 Pet. (U. S.) 56, 58; Gordon *v.* Caldcleugh, 3 Cranch (U. S.), 268; Missouri *v.* Andriano, 138 U. S. 496.

[2] Commonwealth Bank of Ky. *v.* Griffith, *supra;* Martin *v.* Hunter's Lessee, 1 Wheat. (U. S.) 304, 344, 348. See Dodd, "The U. S. Supreme Court as the Final Interpreter of the Federal Constitution," 6 Ill. L. REV. 289.

[3] See 28 HARV. L. REV. 408.

[4] 36 AM. BAR ASSOC. REP. 462, 469.

[5] 38 STAT. AT L. 790 (Dec. 23, 1914). See 28 HARV. L. REV. 408.

[6] 39 STAT. AT L. 726 (Sept. 6, 1916); JUD. CODE, § 237.

[7] Ireland *v.* Woods, 246 U. S. 323.

enabled to widen its scope of review and yet control the natural increase in causes demanding its consideration.

Unfortunately, it seems impossible to determine whether the purpose of the amendments has been effected. The numerical results are of course ascertainable. Under the 1914 amendment but three petitions for writs of *certiorari* to state courts were filed. All were denied.[8] Under the 1916 amendment, up to the October (1919) term, one hundred and thirty-five petitions for such writs had been considered by the court.[9] In only twenty-nine cases did the writ issue. Of the latter, eight could not, prior to 1914, have properly come before the court, for in the case below the state court had sustained the validity of the federal right claimed.[10] Seventeen cases, in which the state court had denied the validity of such right, were formerly reviewable by writ of error.[11] Only three of these twenty-nine cases have, up to the present time, been finally determined by the court. Of these, two were not formerly reviewable, having sustained the federal claim;[12] the remaining case denying that claim was formerly reviewable by writ of error only.[13] The state court was

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[8] Stowe *v.* Taylor, 241 U. S. 658; Callaghan *v.* Commonwealth of Mass., 241 U. S. 667 (223 Mass. 150, 111 N. E. 773); Baltimore *v.* United Ry. Co., 241 U. S. 671 (127 Md. 660, 96 Atl. 880). The lower court decisions are given where obtainable. An examination of the proceedings in the lower court affords the best means of ascertaining the issue involved, since the Supreme Court renders memorandum decisions only.

[9] In the October term, 1916, seventeen were denied and five granted; in the October term, 1917, forty-one were denied and seven granted; in the October term, 1918, forty-eight were denied and seventeen granted.

[10] Macleod *v.* N. E. Tel., etc. Co., 39 Sup. Ct. Rep. 389 (122 N. E. (Mass.) 547); Seaboard Air Line R. Co. *v.* Horton, 39 Sup. Ct. Rep. 8 (175 N. C. 472); Calhoun *v.* Massie, 39 Sup. Ct. Rep. 289 (97 S. E. (Va.) 576); Southern Pacific R. Co. *v.* Berkshire, 39 Sup. Ct. Rep. 494 (207 S. W. (Texas) 323); Philadelphia, etc. R. Co. *v.* Smith, 39 Sup. Ct. Rep. 6 (103 Atl. (Md.) 945); Northern Pacific R. Co. *v.* McComas, 243 U. S. 653 (82 Ore. 639); Gratiot County Bank *v.* Johnson, 243 U. S. 645 (193 Mich. 452).

[11] See Hull *v.* Philadelphia, etc. R. Co., 39 Sup. Ct. Rep. 7 (104 Atl. (Md.) 274); Ward *v.* Commissioners, 39 Sup. Ct. Rep. 12 (173 Pac. (Okla.) 1050); Chicago, etc. R. Co. *v.* Ward, 39 Sup. Ct. Rep. 10 (173 Pac. (Okla.) 212); Tyrell *v.* Shaffer, 39 Sup. Ct. Rep. 19 (174 Pac. (Okla.) 1074); Broadwell *v.* Commissioners, 39 Sup. Ct. Rep. 259 (175 Pac. (Okla.) 828); Lee *v.* C. of Georgia R. Co., 39 Sup. Ct. Rep. 7 (95 S. E. (Ga.) 718); Hartford Life Ins. Co. *v.* Johnson, 245 U. S. 664 (197 S. W. (Mo.) 132); Postal Tel. Co. *v.* Dickenson, 39 Sup. Ct. Rep. 11 (79 So. (Miss.) 719); Pere Marquette R. Co. *v.* French, 39 Sup. Ct. Rep. 494 (204 Mich. 578); Brooks Scanlon Co. *v.* Commissioner, 39 Sup. Ct. Rep. 494 (81 So. (La.) 727); Kenney *v.* Lodge, 39 Sup. Ct. Rep. 390 (285 Ill. 188); N. Y., etc. R. Co. *v.* Goldberg, 245 U. S. 655 (149 N. Y. Supp. 629).

[12] Gratiot County Bank *v.* Johnson, 39 Sup. Ct. Rep. 263 (*certiorari* granted, 243 U. S. 645; lower court decision, 193 Mich. 452, 160 N. W. 544). In this case the defendant in error claimed, under the Federal Bankruptcy Act, that as all creditors could intervene in bankruptcy proceedings, it must be assumed that they had, and therefore all creditors would be bound as to all subsidiary facts upon which the adjudication was based. The state court decision upholding this contention was reversed by the Supreme Court.

In Northern Pacific R. Co. *v.* McComas, 39 Sup. Ct. Rep. 546 (*certiorari* granted, 243 U. S. 653; lower court decision, 82 Ore. 639, 161 Pac. 562), the defendant in error claimed title by adverse possession of lands which it alleged had been granted to the plaintiff in error under a federal statute. The state court decision, holding that this land had passed to the railroad under the statute and was held by the company during the period of adverse possession relied on, was reversed by the Supreme Court.

[13] Baltimore & Ohio R. Co. *v.* Leach, 39 Sup. Ct. Rep. 254 (*certiorari* granted, 243 U. S. 639; lower court decision, 173 Ky. 452, 191 S. W. 310). In this case the state court gave judgment for the defendant in error, for damages based on injury to his

reversed in all three cases. These figures indicate that in so far as the amendments were designed to prevent the overloading of the court, they have been successful.

Whether the main purpose of the legislation — to insure a uniform interpretation of federal law — has been effected, is a more difficult question. The road of review by writ of error is well marked;[14] but there are few judicial guideposts in the maze of *certiorari*. The petitions are granted or denied by memorandum decisions; no reason for the decision is given, no declaration of principles is made which guide the exercise of its discretionary authority. Since a writ of error issues as of right, the decisions on petitions for these are of slight significance as to the court's action on petitions for writs of *certiorari*. Nevertheless, cases of this latter type, in which the writ has been denied for want of jurisdiction, contain the only judicial construction of the legislation under consideration. In certain recent cases, the court has stated that a writ of *certiorari* should have been requested, but has given no further indication that such would have been granted.[15] A less satisfactory class of cases is comprised of those in which the court, by elimination, has determined that a writ of error does not lie, but has refused to commit itself as to the propriety of *certiorari* proceedings.[16] Perhaps it is

stock while in transit on the railroad company's line. The shipper had not complied with the provision of the bill of lading, approved by the Interstate Commerce Commission, which specified that notice of claims must be filed within five days from removal of stock from transit to preserve the liability of the railroad company. The state court's decision refusing to recognize the validity of the defense of the railroad company based on the lack of such notice was reversed by the Supreme Court.

[14] For valuable notes on this subject, see 62 L. R. A. 513; 63 L. R. A. 33; 5 FED. STAT. ANN. 724; FED. STAT. ANN. (Supplement, 1918) 412.

[15] Erie R. Co. *v.* Hamilton, 248 U. S. 369. In this case the railroad claimed to have secured a valid release of Hamilton's claim for damages from the Russian consul, acting under the authority of a United States treaty. The lower court denied the consul's power to make a valid release. Petition for writ of error was dismissed for want of jurisdiction, since the validity of the treaty was not questioned, but only an authority exercised thereunder. The court stated that a writ of *certiorari* should have been requested.

In Rust Land & Lumber Co. *v.* Jackson, 39 Sup. Ct. Rep. 424, the result of a controversy in a state court depended upon the location of the state boundary line. The state court refused a continuance asked for on the ground that the boundary dispute was at that time being adjudicated in the United States Supreme Court. The plaintiff in error claimed that by such refusal the validity of the authority of the Supreme Court to determine the question was denied, and sought a writ of error. The court dismissed the writ, remarking that *certiorari* was the only available proceeding here, since the plaintiff in error did no more than assert a title, right, privilege, or immunity under the United States Constitution. See also Philadelphia & Reading Coal & Iron Co. *v.* Gilbert, 245 U. S. 162.

[16] Dana *v.* Dana, 39 Sup. Ct. Rep. 449. The state court in this case held that certain interests in property without the state were taxable under the state succession tax. A writ of error was requested on the ground that the property being real estate outside the state, the assessment of the tax was a violation of the rights secured by the Fourteenth Amendment to the Constitution of the United States, in that it took the property of the plaintiff in error without due process of law. The court said: ". . . Neither the validity of the statute, nor the validity of any authority exercised under the State, was drawn in question. The case was decided on the view which the Supreme Judicial Court entertained of the character of the property involved, and neither in the record, nor in the opinion of the Court, does it appear that any question was raised or decided which involved the validity of the statute of the State, on the ground of its repugnancy to the Constitution, treaties, or laws of the United States. It follows that the only

significant that in the three cases finally decided, the state court was reversed.[17] But if the writs are to issue only when the court is ready to reverse, it would seem that the final arguments should be made at the preliminary hearings on the petition, which, of course, is not the present practice.

It is likely that the Supreme Court, in the exercise of this discretionary jurisdiction, will be governed by the considerations affecting its action on petitions for writs of *certiorari* to the circuit courts of appeal. In such cases the power is exercised sparingly, only when the question is of gravity and importance and of such a national or public concern as to require a considered determination of the issue by the supreme judicial authority of the country.[18] The writ will probably be granted by the court only when it is convinced of the necessity of settling a controverted federal question, or when a state court has departed rather widely from an accepted construction of federal law.[19]

RECENT CASES

AGENCY — PRINCIPAL'S RIGHTS AGAINST AGENT — RECOVERY FOR AGENT'S NEGLIGENCE DENIED WHERE EQUIVALENT TO AN INDEMNITY FOR PRINCIPAL'S OWN TORT. — The plaintiff in a letter to the defendant, his confidential financial investigator, maliciously libeled A. Through the carelessness of the defendant, A learned of the defamatory remarks, and recovered substantial damages in a libel suit against the plaintiff. The latter then brought this action to be reimbursed for the loss sustained. *Held*, that the plaintiff was entitled to nominal damages only. *Weld-Blundell* v. *Stephens*, [1919] 1 K. B. 520.

In general, an agent negligent in the performance of his duty is liable to the principal for all damages proximately resulting from that negligence. *Geisse* v. *Franklin*, 56 Conn. 83, 13 Atl. 148; *Gilson* v. *Collins*, 66 Ill. 136. See 1 MECHEM, AGENCY, 2 ed., §§ 1275 *et seq.* The difficulty in the present case is that the enforcing of this relational obligation would indemnify the principal for the consequences of his own wrong. Formerly, a tortfeasor could never recover indemnity. *Merryweather* v. *Nixan*, 8 T. R. 186. See 12 HARV. L. REV. 176. But to-day he may where the tort was unintentional. *Navigation Company* v.

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right of review in this court of the decree of the Supreme Judicial Court of Massachusetts was by writ of *certiorari*."

[17] See notes 12, 13, *supra*.

[18] Forsyth *v.* Hammond, 166 U. S. 506; American Construction Co. *v.* Jacksonville, etc. Co., 148 U. S. 372; McClelland *v.* Carland, 217 U. S. 268; Lutcher, etc. Lumber Co. *v.* Knight, 217 U. S. 257.

[19] See notes 12, 13, *supra*. It is interesting to note that in no case in which the writ was granted had the validity of a state statute, or authority exercised under the state, been attacked and denied on the ground of repugnancy to the Constitution, treaties, or laws of the United States. It was thought that under the new legislation, decisions of reactionary state courts denying the constitutionality of modern legislation dealing with new economic problems would be corrected. 28 HARV. L. REV. 408. A reading and comparison of State *v.* Williams, 189 N. Y. 131, with Muller *v.* Oregon, 208 U. S. 412, and of People *v.* Orange County Road Construction Co., 175 N. Y. 84, with Atkin *v.* Kansas, 191 U. S. 207, convinces one that the advocates of the reform legislation had this in mind. As yet, however, no writs have issued in this class of case; but this is not surprising, considering the comparative youth of the amendments.